

STUDENT	§	BEFORE A SPECIAL
BNF PARENT	§	EDUCATION
Petitioner	§	
v.	§	HEARING OFFICER FOR THE
	§	
HOUSTON INDEPENDENT	§	
SCHOOL DISTRICT	§	
Respondent	§	STATE OF TEXAS

FINAL DECISION OF THE HEARING OFFICER

STATEMENT OF THE CASE

Petitioner, Student *** and student's next friend and parent, *** (hereinafter referred to collectively as Petitioner and individually as Student or Parent), brings this action against Respondent Houston Independent School District (hereinafter Respondent, the District, or HISD) under the Individuals With Disabilities Education Improvement Act, as amended, 20 U.S.C. §1401 et. seq. (IDEA) and its implementing state and federal regulations. This action was filed on February 12, 2014 and subsequently amended on March 14, 2014.

Following the amended request for due process, the issues identified and relief requested by Petitioner were as follows:

1. Petitioner alleges that Respondent did not provide Student with a free appropriate public education from the start of the 2013-2014 school year until the time of student's withdrawal from special education services. Petitioner alleges that Respondent failed to provide Student with an appropriate IEP for Reading, failed to properly implement student's IEP, and failed to provide a program that could be expected to result or which did result in reasonable progress in Reading;
2. Petitioner alleges that Respondent failed to provide Student with forty hours of compensatory reading services as ordered in TEA Docket No. 131-SE-0213; and
3. Petitioner seeks reimbursement for private reading therapy in the amount of \$3,993.00 on the grounds that such private services were necessitated by Respondent's failure to provide Student with a free appropriate public education.
4. Petitioner alleges that Respondent violated its Child Find duty under IDEA in that the repeated suspensions of Student on the basis of behavior should have triggered a request to evaluate Student for the presence of an emotional disturbance that would support IDEA eligibility.

For relief, Petitioner seeks an order finding that Student has been denied a free appropriate public education during the 2013-2014 school year while receiving special education services; an order expediting the implementation of the 40 hours compensatory education awarded in Docket No.

131-SE-0213, as well as an award of a minimum of 20 additional hours of compensatory services due to the delays in implementation; an award of a minimum of 40.5 hours of compensatory services for the denial of a free appropriate public education for the 2013-2014 school year; reimbursement in the amount of \$3,993.00 for private reading services provided to Student by Parent; evaluation for IDEA eligibility and consideration of such eligibility by an ARD Committee; and attorney fees and expenses.

In an Order Denying Respondent's Motion For Summary Judgment In Part and Dismissal Without Prejudice For Lack Of Jurisdiction In Part issued on April 24, 2014, I dismissed Issue Number Two above concerning to Petitioner's claim for alleged failure to implement the Hearing Officer decision rendered in Docket No. 131-SE-0213 for lack of jurisdiction.

As such, the remaining issues in this docket are as follows: 1) Whether Respondent failed to provide Student with a free appropriate public education between August 26, 2013 (the start of the 2013-2014 school year) and November 6, 2013 (the date Parent withdrew consent for special education services) and, if so, what is the appropriate remedy (reimbursement for private services and/or compensatory education); and 2) Whether Respondent violated its Child Find duty under IDEA by not initiating a special education evaluation prior to March 14, 2014 in response to Student's increased disciplinary incidents at school.

PROCEDURAL HISTORY

Preceding the instant action, Petitioner filed a prior due process hearing request in February 2013 that involved claims related to the 2011-2012 and 2012-2013 years. That case, styled *Student v. Houston ISD, Docket No. 131-SE-0213 (TEA September 2013)* will be referenced herein as DPH #1.

Petitioner filed the instant request for due process on February 12, 2014. Michael O'Dell, Attorney at Law, represents Petitioner in this proceeding. Hans Graff, Attorney at Law, represents Respondent.

Houston ISD did not convene a resolution session in this matter.

Petitioner filed a Motion To Recuse The Hearing Officer on February 18, 2014, which was denied by the undersigned Hearing Officer on February 20, 2014 and by the reviewing Special Education Hearing Officer on February 26, 2014.

Respondent filed a Motion To Dismiss on February 25, 2014, setting forth several grounds for dismissal. The parties subsequently agreed that Respondent's motion should properly be designated as a Motion For Summary Judgment given its reliance on matters beyond the pleadings on file in this cause. *See, Order Following Pre-Hearing Conference, March 8, 2014.*

A pre-hearing conference was held on March 3, 2014. An Order Following Pre-Hearing Conference was entered on March 8, 2014 outlining the issues in dispute, setting a schedule to resolve Respondent's Motion For Summary Judgment, and extending the decision due date to May 23, 2014 for good cause at the request of Petitioner.

On March 14, 2014, Petitioner filed petitioner's First Amended Request For Due Process and by Order dated March 17, 2014, I granted Petitioner leave to file petitioner's amended request for

due process pursuant to 34 C.F.R. § 300.508(d)(3) and issued a revised scheduling order. Pursuant to the revised scheduling order, the decision due date was extended to May 28, 2014.

A second pre-hearing conference took place on April 2, 2014 following the filing of the First Amended Request For Due Process. The issues were amended to reflect the addition of Petitioner's Child Find claim. Respondent indicated its intent to file a revised Motion For Summary Judgment to encompass the amended claim. On April 4, 2014, I issued an Order Following Second Pre-Hearing Conference and Second Revised Scheduling Order, setting a schedule for Respondent's Motion For Summary Judgment and confirming the hearing and decision dates previously agreed upon.

On April 24, 2014, I entered an Order Denying Respondent's Motion For Summary Judgment In Part and Dismissal Without Prejudice For Lack Of Jurisdiction In Part.

The hearing took place on April 28-29, 2014 at the administrative offices of HISD. At the conclusion of the due process hearing, by joint request of the parties, I granted leave to file closing briefs and entered an Order Granting Joint Request To Extend Decision Due Date For Filing Post-Hearing Briefs, setting the due date for briefs to May 30, 2014 and the decision due date as July 25, 2014.

This decision is timely issued and forwarded to the parties on July 24, 2014.

FINDINGS OF FACT

Based on a review of the testimonial and documentary evidence submitted in this cause, I find the following facts to be established based on the weight of the credible evidence:

1. At all times relevant to this proceeding, Student lived with student's mother and next friend within the geographical boundaries of HISD, a political subdivision of the State of Texas and a duly incorporated school district.
2. Student is eligible for special education and related services under IDEA as a student with an Other Health Impairment (OHI) based on Attention Deficit Hyperactivity Disorder (ADHD) and a Specific Learning Disability in the areas of Basic Reading, Reading Comprehension, and Dyslexia. (Petitioner Exhibit, 1, p. 1.3) (hereinafter cited as P.1.3).
3. During the 2013-2014 school year, Student attended *** grade at the *** School (***) in Houston ISD. (P1).

Background Facts

4. During the 2012-2013 school year, Student filed DPH #1 in February 2013 asserting, in relevant part, claims related to student's educational program at *** that year. As relief, Petitioner requested, in relevant part, the provision of a private reading program at ***. Student began to obtain services from *** at personal expense on July 3, 2013, while DPH #1 was still pending.

5. Student's most recent annual Admission, Review and Dismissal Committee (ARDC) was held at the end of student's *** grade year, in May 2013. Agreement was not reached on Student's IEP at that time. (R.13).
6. Because Student filed DPH #1 on February 15, 2013, Student's stay put placement since that time was student's last agreed upon placement, which was developed at a December 2012 ARDC. (Transcript, p. 88, 188)(hereinafter T.88, 188); (Respondent Exhibit 25, pp. 374-375)(hereinafter R.25.374-375).
7. DPH #1 was still pending at the start of the 2013-2014 school year, so HISD contacted Petitioner, through petitioner's attorney, to confirm Student's stay put placement pending the decision in DPH #1. The parties agreed that HISD would implement Student's Behavior Support Plan (BSP) from the May 2013 ARDC and the December 2012 IEP for the academic goals and objectives and amount of time in the resource setting (60 minutes). (R.25.322, 354-385).
8. The decision in DPH #1 was issued on September 6, 2013. The Hearing Officer found a denial of a free appropriate public education during the 2012-2013 school year and ordered forty (40) hours of compensatory reading services to be provided by HISD. The Hearing Officer did not award the Petitioner the private reading program from ***. (R.16).

Fall 2013 ARDC Meetings

9. HISD convened an ARDC on September 17, 2013 to implement the decision. (P.1). In addition, the September ARDC was designated as a review ARDC to revise and update Student's IEP based on new progress and performance data. HISD brought a revised IEP to consider at the ARDC. (P.1.1).
10. The September ARDC discussed the provision of the forty hours of compensatory services ordered by DPH #1. Disagreements and misunderstandings developed over when, how, and whether to implement the services and what representations had been made on these subjects by each of the parties, both in the ARDC and prior to the ARDC in conversations between the attorneys. (P.2.26, P.30, P.31; T. 63, 88).
11. Petitioner made clear before and during the September ARDC that she wanted HISD to pay for services from *** and stop providing special education reading services to Student until student completed the *** program. Petitioner clearly stated that she wanted to receive as little special education reading service from HISD as possible, ideally none. (T. 88, 96, 114-115; R.25,322-332, P.30, P.31).
12. HISD declined to pay for the *** program or to halt special education reading services. (T.115). Petitioner continued the *** program on petitioner's own until October 29, 2013. (P.18).
13. The September 2013 ARDC did not complete its review of the newly proposed IEP revisions, and agreed that Parent would review the IEP goals and objectives and return to ARDC on October 4, 2013 to discuss the IEP and continue conversation about the forty hours of compensatory education. (T. 92, 95-96).

14. The September ARDC agreed to increase Student's special education instruction in the resource setting to 90 minutes as provided for by the May 2013 IEP. The ARDC also agreed to continue with the December IEP goals and objectives pending discussion of the newly proposed IEP at the October 4, 2013 ARDC. Counseling services were proposed, but Parent declined, stating that behaviors seemed to be acceptable thus far into the school year. (P.2.26).
15. Respondent offered to make up the thirty minutes per day of additional service mandated by the May 2013 IEP between the dates of August 26, 2013 (the day school started) and September 17, 2013 (the date Student began receiving the May service level of 90 minutes of resource instead of the December 2012 service level of 60 minutes per day) by providing additional compensatory education, but Petitioner declined the services. (P.2.26).
16. The minutes from the September 2013 ARDC did not populate into the ARDC paperwork because the Easy IEP program brought forward the minutes from the May 2013 ARDC instead. (T.66, 67, 89-90, 354; P1.24). Upon realizing the day after the ARDC meeting that the minutes were not included in the ARDC paperwork, the program specialist who had taken the minutes informed HISD administrators and provided a copy of the minutes. (R.25.350; T.70, 386-387). The minutes were provided to Petitioner prior to the scheduled October 4, 2013 reconvene ARDC. (T.386-387; R.25.332-333).
17. Prior to the October 4, 2013 ARDC, Petitioner contacted HISD and cancelled the ARDC. Despite the cancellation, HISD held the ARDC without Parent in attendance because of the need to develop a schedule for the forty hours of compensatory education in order to be in compliance with the Texas Education Agency. (R.25.342; T.96)
18. The October 4, 2013 ARDC discussed matters beyond the provision of the forty hours of compensatory education. The ARDC reviewed Student's academic and behavior progress to date. As of October 4, 2013, Student was able to read 5 words per minutes. Student complied with a teacher's request if asked 3-5 times, was resistant to attempting academic tasks and was unable to work independently. Student was reluctant to write at all and had to dictate answers. Student required *** of all instructions in student's *** class. Student was failing all subject areas taught ***. Results from assessment data (IStation and Stanford) indicated that Student was significantly below grade level in Reading. (P.2.27).
19. Based on the review of Student's progress and needs, the ARDC proposed revisions to Student's IEP, a counseling evaluation, increasing special education resource services to 120 minutes or two hours, and implementation of Student's IEP at student's home campus of *** rather than at ***. The ARDC recommended a return to Student's home campus because of the curriculum structure at ***, the limited academic and behavioral progress Student had demonstrated while at ***, and the need to provide special education interventions and reinforcement of *** reading throughout the school day, which was not possible given the *** structure. (P2.27).
20. Parent did not attend the meeting, so the recommendations of the October 4 ARDC were not implemented. Parent requested an ARDC without attorneys to review Student's

- program; as such, the ARDC met again on October 21, 2013 and reviewed the recommendations made at the October 4, 2013 meeting. Parent was provided a copy of the proposed IEP in advance of the October 21 ARDC. (R.25.319; P.2.28).
21. The minutes of the October 4 ARDC were not provided to the Parent until the October 21, 2013 ARDC paperwork was generated, at which time minutes from September 17, October 4, and October 21 were added to the open ARDC document. (T.356-358; P.2.26-28).
 22. The glitches with the minutes associated with the Easy IEP program delayed timely provision of the minutes to the Parent, but did not impact the accuracy of the minutes. No evidence was introduced to suggest that the minutes ultimately attached to the ARD paperwork were altered from the minutes typed during the ARDC meetings. (T. 336, 388).
 23. On October 21, 2013, the ARDC reviewed the IEP developed at the October 4 ARDC. Presentations were made to Parent concerning Student's academic and behavioral performance to date. Information was shared with Parent about Student's performance in class, student's baseline data, and the rationale for the school recommendation that resource services be increased to two hours and implemented at Student's home campus. A counseling assessment was offered to support counseling services, which was ultimately declined. The ARDC ended in disagreement over placement at Student's home school and a ten-day recess ARDC was planned. (P2).
 24. A reconvene ARDC met on November 5, 2013. The ARDC reviewed the reading programs being used to teach Student and additional progress data. The school members of the ARDC continued to recommend that Student receive two hours per day of instruction in the resource setting at student's home campus. Parent continued to disagree. (P3).
 25. On November 6, 2013, Parent withdrew consent for Student to receive special education services. (P.19).

IEP and Services Provided In Fall 2013 Prior To Revocation Of Consent

26. Student's resource teacher began implementation of the May 2013 IEP service level as of September 17, 2013, resulting in 90 minutes of 1:1 instruction in the Resource setting for Reading and Language Arts. She followed the December 2012 goals and objectives from the start of school until October 4, at which point, she began to implement the May 2013 IEP in its entirety. (T. 188, 223-224, 229, 300-304; R.13).
27. HISD did not implement the IEP proposed in September 2013 and revised in October 2013 during fall 2013, as discussions about the IEP were ongoing throughout the fall and Parent revoked consent for special education services prior to its implementation. Rather, the IEP in effect in fall 2013 was the December 2012 IEP initially, followed by the May 2013 IEP.
28. Student's May 2013 IEP was developed in accordance with the procedural mandates of IDEA. The IEP included recommendations made by the two independent evaluations

obtained by Petitioner in spring 2013 and addressed each of Student's unique academic and behavioral/emotional needs. (R.10, R.12, R.13).

29. The May 2013 IEP contained appropriate goals and objectives related to Reading, Written Language, and Behavior. The goals that Student's teacher addressed during fall 2013, as evidenced on progress data reporting, correlated to the May IEP. (P23). The resource teacher's lesson plans also correlated to the May 2013 IEP. (T. 303-304).
30. In the area of Reading, the resource teacher worked with Student on letter recognition, site words, phonics, and reading comprehension in an intensive 1:1 setting. (T.266). She provided a reliable structure and routine. Student's daily instruction included warm-up activities, such as rapid naming of letters; phonological activities, including phonological awareness; thinking skills activities; and direct instruction in reading strategies, comprehension, and vocabulary. (T. 207-208).
31. In the area of Written Language, she worked with Student on reading a story, using pictures to sequence ideas, developing an oral perspective, and developing detail. Student dictated to the teacher for writing exercises and was just beginning to write on student's own in November 2013. (T. 206-207).
32. Student's instructional program in Reading and Written Language during fall 2013 was consistent with student's IEP and with the recommendations made in the independent educational evaluation completed in spring 2013. Student's program addressed student's identified areas of need and was reasonably calculated to provide an educational benefit to student. (R.10, R.13).

Student's Progress During Fall 2013

33. Student began the 2013-2014 school year with greater anxiety and reluctance to read than student exhibited at the end of the preceding year. (T.204-205). Student made some small measure of progress during fall 2013, but the progress was not as consistent as the previous year and additional services were needed. (T. 205). Student did not make significant gains in reading as a result of the *** services Student received in the summer and fall of 2013. (T.142, 205, 209).
34. The resource teacher used a computerized reading assessment and instructional program- IStation- that replaced HISD's use of the TPRI and provided paced instructional lessons. (T.98, 158-160). Student used IStation as a part of student's daily instructional learning, as well as for monthly assessments. (T. 159, 172).
35. The IStation data does not conclusively demonstrate whether Student made progress during the period of August 26, 2013 to November 6, 2013 (the ten week period at issue). Between September and November, Student's scores show a notable increase in Vocabulary, slight increases in Comprehension and Letter Knowledge, negligible increases in Phonemic Awareness and Alphabetic Decoding, and decreases in Spelling and Text Fluency. (P.7; T. 99-100). Overall, the only conclusion conclusively demonstrated by the IStation data is that Student continues to perform "seriously below grade level and is in need of intensive intervention." (P.7).

36. During fall 2013, Student did not understand the *** instructions in subjects taught *** and was disengaged; as such, student did not benefit from the curricular reinforcements that were provided during the *** of the school day. (T. 269, 276-277).
37. The first nine-week grading period was devoted primarily to review, but Student still struggled with the academic tasks. (T. 170).
38. In October 2013, the ARDC recommended increasing Student's special education instruction time from 90 minutes to two hours because of student's slow progress in the fall and student's demonstrated lack of progress over time at ***. (T. 214; P.2.27). Any progress made by Student between September and November 2013 was minimal.

Progress And Events Subsequent To Revocation Of Consent

39. Following Student's withdrawal from special education, Student's IStation ratings show a notable decline in Reading (P7.8-9). In addition, Student's grades declined from passing subjects taught in English to failing all subjects except Social Studies. (R.18; T. 343-344).
40. After Student's withdrawal from special education, student also experienced more difficulty with student's behavior at school. Student's conduct marks on student's report card declined (R.18) and student began to demonstrate more frequent and intensive behavioral challenges that resulted in increased disciplinary events, including suspensions. (P.5; T. 288-293). The behaviors exhibited were substantially similar to those that are part of student's identified disability. (T. 89, 104). It is well documented that a failure to adequately address Student's academic needs results in increased problem behaviors. (R.6, R.12). The types of behaviors demonstrated by Student following student's withdrawal from special education are of the same type previously exhibited during periods where student did not receive adequate special education support. (R.6, R.12, R.13).
41. Petitioner does not want a special education evaluation or special education services for Student, despite asserting a violation of Respondent's Child Find duty in this action. (T. 324, 327, 401-404).
42. After Petitioner alleged a violation of Child Find, Respondent convened a referral team, which recommended a full psycho-educational and educational evaluation pending receipt of Parent's consent to evaluate. As of the date of the due process hearing, Parent had not provided consent to evaluate. (T. 400-401). Parent has been very clear that she does not want the special education services provided by Respondent, as she believes them to be ineffective. (T. 104, 327).

DISCUSSION

The background and context for the instant dispute is complex, but the issues presented are narrow and focused: 1) Did Respondent provide Student with a free appropriate public education between August 26 and November 6, 2013 and, if not, what is the remedy; and 2) Did Respondent violate its Child Find Duty under IDEA by not initiating an evaluation of Student

following Parent's revocation of consent for special education on November 6, 2013 and before the filing of this claim in March 2014?

Though much evidence and argument was offered on the issues of Student's placement at *** or student's home campus and the provision (or lack thereof) of the forty hours of compensatory education ordered in DPH #1, neither of these issues is before me in this cause.

I. Denial of FAPE Between August 26, 2013 and November 6, 2013

The purpose of IDEA is to ensure that all children with disabilities have available to them a free, appropriate public education that provides special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living. *20 U.S.C. § 1400 (d)*. Under IDEA, HISD has a duty to provide Student, who is eligible for services, a free appropriate public education. *34 C.F.R. § 300.101 (a)*.

Legal Standards Governing FAPE

IDEA requires Respondent to provide Student with a free appropriate public education that consists of "personalized instruction with sufficient services to permit the child to benefit educationally from that instruction." *Hendrick Hudson Central School District v. Rowley*, *458 U.S. 176 (1982)*. In *Rowley*, the court developed a two prong analysis to determine if a school district has met its obligation to provide a free appropriate public education: 1) whether the district complied with the procedural requirements of IDEA, and 2) whether the district offered a program to the student that was reasonably calculated to provide educational benefit. *Id. at 206-207*. In the instant case, Petitioner asserts both procedural and substantive deficiencies in the provision of FAPE during fall 2013.

Procedural Requirements of FAPE

Petitioner alleged numerous procedural violations of IDEA pertaining to the *content* of student's IEP (present levels of performance not accurate and up-to-date, goals vague and not measurable, goals not realistic for one year's growth, Reading IEP not based on a scientific research based curriculum with correct scope and sequence) and the *implementation* (lack of clarity as to which IEP the teacher was implementing, lack of progress reporting on IEP goals).

It is well settled that procedural violations constitute a denial of a FAPE only if the procedural inadequacies impede the child's right to a free appropriate public education, significantly impede the parent's opportunity to participate in the decision-making process regarding the provision of a free appropriate public education, or cause a deprivation of educational benefit. *34 C.F.R. 300.513(a)*.

Petitioner's closing argument focuses on deficiencies in the IEP proposed at the September 2013 ARDC and later revised at the October 2013 ARDCs; however, the proposed IEP was not implemented. Rather, the December 2012 IEP was implemented initially, by agreement of the parties, and the May 2013 IEP was then subsequently implemented. At four ARDC meetings between September and November 2013, Respondent proposed a revised IEP with updated goals, present levels of performance, related services, and placement to address Student's academic and behavioral needs; however, the parties did not reach agreement about the proposals, ultimately leading to Parent's withdrawal of Student from special education entirely.

Respondent's reliance on the December 2012 and May 2013 IEPs did not violate the procedural provisions of IDEA. Respondent is required to have a statutorily compliant IEP in place at the beginning of each school year and the evidence establishes that HISD met this requirement with the two IEPs it implemented, the December 2012 IEP with Petitioner's agreement and then the May 2013 IEP.

The *content* of the May 2013 IEP met the procedural requirements of IDEA. The IEP was developed at a duly constituted ARDC meeting, included all of the necessary components of an IEP, contained goals and objectives that are appropriate, defined, and measurable, and addressed Student's performance and needs as assessed at the end of the 2012-2013 school year. (R.10, R.12, R.13). HISD attempted to update the IEP through the ARD process during the fall, as additional information about Student performance became available; however, it was appropriate to implement the May 2013 IEP from Student's last annual ARD while that process was ongoing. Petitioner argues at length in petitioner's closing argument that the IEP fails to conform to an acceptable scope and sequence of a scientifically based reading program; however there is no evidence in the record to support this position.

With regard to *implementation* of the IEP, Petitioner raises a legitimate issue about the confusion surrounding which goals and objectives were being implemented at what point in time. Despite the teacher's confusion when testifying about what goals and objectives she worked on at various points in time, the credible evidence as a whole establishes that the teacher worked on the December 2012 goals and objectives from the beginning of school until October 4, 2013, and then switched to the May goals and objectives. Throughout the fall, Student received intensive 1:1 instruction in the resource setting in reading and written language as provided for in both the December and May IEPs. As such, the evidence indicates that Respondent fully implemented Student's IEP between August 26 and November 6, 2013, and that any confusion about which set of goals and objectives were applicable prior to October 4, 2013 had no impact on the provision of a free appropriate public education to Student or on Parent's opportunity to participate in decision making regarding Student.

Substantive Requirements of FAPE

The essence of determining whether a substantive violation of IDEA has occurred is whether the school's program has provided the student with the requisite educational benefit. IDEA does not require an education that maximizes a student's potential; rather, the school must provide an education that is reasonably calculated to enable the child to achieve *some* benefit. *Some* benefit means an educational program that is meaningful and offers more than a *de minimus* educational benefit; it must be "likely to produce progress, not regression or trivial educational advancement." *Cypress Fairbanks Independent School District v. Michael F.*, 118 F. 3d 245 (5th Cir. 1997).

Although courts have not adopted a specific substantive standard to determine when a free appropriate public education has been provided, the Fifth Circuit in *Michael F.* identified four factors to consider in analyzing a school's program: 1) is the program individualized and based on the student's assessment and performance; 2) is the program administered in the least restrictive environment (not relevant to this case); 3) are the services provided in a coordinated and collaborative manner by the key stakeholders; and 4) are there demonstrated positive benefits both academically and non-academically to the student.

These four factors need not be accorded any particular weight nor be applied in any particular way. Instead, they are merely indicators of an appropriate program and intended to guide the fact-intensive inquiry required in evaluating the school district's educational program for reimbursement purposes. *Richardson Ind. Sch. Dist. v. Leah Z.*, 580 F. 3d 286, 294 (5th Cir. 2009).

Finally, in examining the appropriateness of Respondent's program, a presumption exists in favor of the school district's plan for educating Student. As such, Petitioner bears the burden of proving that Student's program and placement were not appropriate. *Tatro v. State of Texas*, 703 F.2nd 823 (5th Cir. 1983), *aff'd* 468 U.S. 883 (1984); *Schaffer v. Weast*, 546 U.S. 49 (2005).

Applying these legal standards to the evidence in this case, I find that Petitioner did not meet petitioner's burden with respect to Respondent's program during fall 2013. During the relevant time period, the issue in dispute is Student's program in the area of Reading and Written Language. Behavioral progress and the appropriateness of Student's BSP is not at issue.

Was Student's Program Individualized and Based On Assessment & Performance?

Student's IEP for the 2013-2014 school year was developed by the ARDC in May 2013 following the completion of two independent educational evaluations.¹ The IEP, along with Student's BSP, incorporated many of the recommendations made in the two independent evaluations and relied on current testing and performance information about Student. The IEP and BSP appropriately addressed Student's unique needs in reading, writing and behavior/social skills, and recognized the severity of student's need by providing for 1.5 hours per day of specialized instruction in reading and writing in a resource setting with a special education teacher. I find that the IEP was individualized and based on assessment and performance.

Were Services Provided in a Coordinated and Collaborative Manner?

The evidence demonstrates that the key stakeholders at *** provided services to Student in a coordinated and collaborative manner. Student's resource teacher, English teacher, *** teacher, and Principal all worked together toward supporting Student to be successful at ***.

Were There Demonstrated Positive Academic and Non-Academic Benefits?

This factor goes to the heart of whether Student made the educational progress required by *Rowley*. Petitioner argues that any progress Student made in Reading during fall 2013 resulted from the services student was receiving from *** and not from HISD. Petitioner further asserts that Student has never received a meaningful educational benefit in Reading while at ***. Respondent counters that Student made some progress in Reading between September and November as documented in IStation assessments and student's grades, but not sufficient

¹ Respondent implemented the December 2012 IEP for a period at the beginning of the school year pursuant to an agreement between the parties to implement that IEP because of stay put. The IEP offered by Respondent for the 2013-2014 school year, and implemented by Respondent when stay-put ended, is the May 2013 IEP.

progress. Student's lack of sufficient progress formed the basis for the school members of the ARDC's recommendation to increase resource instruction time.

Whether Student obtained an educational benefit from student's program at HISD prior to the 2013-2014 school year was considered in DPH #1 and is not at issue in this proceeding. The focus here is from the start of the 2013-2014 school year to November 6, 2013, when Parent withdrew Student from special education services.

In evaluating Student's progress, I note at the outset that it is almost impossible to assess academic progress in a ten week period, particularly when nine of those weeks comprise the first grading period of the school year and are devoted largely to review. Parent's removal of Student from special education shortly after the end of the first grading period makes it impossible to determine how student would have progressed as the year unfolded and necessarily focuses my inquiry on whether Student was "on the right track" for that point in the school year as opposed to whether student "had arrived."

During the first ten weeks of school, the evidence shows that Student struggled. Student made minimal progress in certain areas of Reading as indicated by IStation results, student's teacher's testimony, and student's grades; however, it is not possible to determine whether that progress resulted from *** services, resource instruction, or both. Respondent was not satisfied with the progress Student was making and, as such, proposed an increase in resource time and a change in placement to support greater academic gains.

I find that Student's progress and Respondent's response to student's progress during the ten-week period at issue was legally sufficient. Student demonstrated small areas of growth in both Reading and Written Language, but more importantly, Respondent noted that Student's progress was not where it should be and took steps to propose changes to Student's program to address student's slow rate of growth. The propriety of those changes is not an issue in this proceeding.

I conclude that minimal academic benefit to Student was demonstrated during the ten-week period at issue and that Respondent appropriately sought to address the limited nature of Student's progress by proposing a change in student's program.

Conclusion on FAPE Issue

In summary, I find that Student's IEP for the 2013-2014 school year addressed student's unique and individualized needs in all areas of disability. I further find that Student obtained some minimal academic benefit during the ten-week period in fall 2013 and that Respondent timely acted to amend student's program to support greater gains going forward. Accordingly, I find Petitioner failed to prove a denial of a free appropriate public education to Student between August 26 and November 6, 2013.

II. Child Find- Failure To Initiate An Evaluation For Special Education Following Parent's Revocation Of Consent For Special Education

Legal Standards Governing Child Find Generally

IDEA provides that school districts have the responsibility to identify, locate and evaluate all children with disabilities residing within their jurisdiction who are in need of special education.

This responsibility is known as “Child Find.” *20 U.S.C. § 1412(a)(3); 34 C.F.R. §§ 300.128 and 300.220.* The Child Find obligation extends to all students within a school district, including students who have been withdrawn from special education services by a parent. Thus, HISD clearly continued to have a Child Find duty with respect to Student following Parent’s revocation of consent for services on November 6, 2013.

IDEA requires a two-pronged analysis for determining whether a student should be identified as eligible for special education services. The “Child Find” obligation is triggered when the school district has reason to suspect the student has a disability and that the student is in need of special education services. *34 C.F.R. §§ 300.8 (a)(1); 300.111(a)(c)(1)* (“*Child find also must include ... children who are suspected of being a child with a disability ... and in need of special education, even though they are advancing from grade to grade.*”).

Child Find Obligation Following Revocation Of Consent For Special Education

Applying this standard to the instant circumstances means that the Child Find obligation would be triggered when the school district had reason to suspect that Student had new or different needs than had been previously identified at the time when consent was revoked for special education services.

Importantly, this obligation would be triggered based on a student’s new and different needs and not solely on a potentially new or different disability category. When a student is designated as eligible under IDEA, a district is obligated to meet all of the student’s needs, whether they are commonly associated with the student’s disability category or not. *34 C.F.R. 300.304(c)(6).* Further, IDEA is clear that “*Nothing in the Act requires that children be classified by their disability so long as each child who has a disability ... and who, by reason of that disability, needs special education and related services is regarded as a child with a disability under Part B of the Act.*” *34 C.F.R. 300.111 (d).*

In Student’s case, Petitioner argues that following the revocation of petitioner’s special education services, student exhibited an increase in the amount and intensity of maladaptive behaviors, along with new behaviors in seemingly new circumstances. Petitioner asserts that these behaviors revealed new or different needs than previously identified and should have triggered a new special education evaluation to assess for a possible emotional disturbance. Respondent counters that Student’s behaviors were part and parcel of student’s previously identified needs and were addressed by student’s IEP at the time Parent withdrew consent regardless of student’s disability classification. Respondent asserts that no new circumstances arose which would have triggered Respondent’s Child Find duties.

The evidence supports Respondent’s position. Before revocation of consent for special education services, Student was identified with both academic and behavioral/emotional needs. Student had an extensive BSP and had been repeatedly offered counseling to help manage frustration and inappropriate reactions to peers and adults. The behaviors displayed by Student after November 6, while perhaps initially more intense and frequent, are substantially similar to behaviors documented over a several year period. In fact, Student’s past record supports the predictable result that behavioral problems would escalate when academic and behavioral supports were withdrawn. This link between Student’s behavior issues and reading deficits was noted in student’s assessments as early as April 2012.

In short, after Parent withdrew consent for special education services, behaviors emerged that were precisely the reason for the special education services in the first place. Student did not exhibit new or different needs that should have triggered Respondent's Child Find duty. Respondent was required to, and did, stop all special education services when Parent withdrew consent. At least during the 2013-2014 school year, until such time as Petitioner requested services or Student demonstrated a new and different need for services, Respondent's Child Find duty toward Student was not triggered.

CONCLUSIONS OF LAW

1. Respondent Houston ISD is an independent school district duly constituted in and by the state of Texas, and subject to the requirements of the IDEA and its implementing federal and state regulations. Houston ISD is Student's resident district under IDEA for all time periods relevant to this action.
2. Student bears the burden of proof on all issues raised in this proceeding. *Schaffer ex. rel. Schaffer v. Weast*, 546 U.S. 49 (2005).
3. Petitioner failed to meet petitioner's burden of proof to establish a denial of a free appropriate public education for Student between August 26, 2013 and November 6, 2013. 34 C.F.R. § 300.101.
4. Petitioner failed to meet petitioner's burden of proof to establish a violation of Respondent's Child Find duty between November 6, 2013 and March 14, 2014. 34 C.F.R. § 300.111.

ORDER

After due consideration of the record, and the foregoing Findings of Fact and Conclusions of Law, this Hearing Officer hereby **ORDERS** that all relief sought by Petitioner is **DENIED**.

SIGNED and **ENTERED** this 23rd day of July 2014.

Lynn E. Rubinett

Lynn E. Rubinett

Special Education Hearing Officer for the State of Texas

TEA DOCKET NO. 131-SE-0213

STUDENT	§	BEFORE A SPECIAL
BNF PARENT	§	EDUCATION
Petitioner	§	
v.	§	HEARING OFFICER FOR THE
	§	
HOUSTON INDEPENDENT	§	
SCHOOL DISTRICT	§	
Respondent	§	STATE OF TEXAS

SYNOPSIS

Issue: Whether Respondent failed to provide Student with a free appropriate public education between August 26 and November 6, 2013?

Held: For the District. Student failed to meet student’s burden of establishing that Respondent denied student a free appropriate public education. Student did not demonstrate that student’s program lacked the indicia of a free appropriate public education and failed to provide student with the requisite benefits.

Cite: 34 C.F.R. § 300.101 (a).

Issue: Whether Respondent violated its Child Find Duty by not initiating a special education evaluation of Student between November 6, 2013 and March 14, 2014?

Held: For the District. Student failed to establish any facts that would trigger Respondent’s Child Find duty following Parent’s revocation of consent for special education on November 6, 2013.

Cite: 34 C.F.R. § 300.111.